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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

EASTERN CONNECTICUT HEALTH SERVICES, INC.
d/b/a NEW LONDON CONVALESCENT HOME,
Petitioner,

v

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

NEW ENGLAND HEALTH CARE EMPLOYEES UNION,
DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND
HEALTH CARE EMPLOYEES, AFL-CIO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS *FOR THE SECOND CIRCUIT*

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS *FOR THE SECOND CIRCUIT*

TO the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Eastern Connecticut Health Services, Inc. d/b/a New London Convalescent Home[1] the Petitioner herein, prays that a writ of

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1. In accordance with Supreme Court Rule 28, Petitioner states that there are no parent companies, subsidiaries or affiliate corporations.

certiorari issue to review the judgment of the Second Circuit Court of Appeals entered in the above entitled case on April 8, 1987.

QUESTIONS PRESENTED

1. Whether this Honorable Court's decision in *NLRB v. Financial Institution Employees of America, etc., et.al and Seattle-First National Bank v. Financial Institution Employees of America, etc., et.al.*, _____ U.S. _____, 106 S.Ct. 1007, 89 L.Ed. 2d 151 (1986) (hereafter referred to as *"Sea-First"*) allows a union to completely disenfranchise all of its members as well as all employees in Petitioner's collective bargaining unit from voting on whether the Union should disaffiliate from its parent organization.

2. Whether bargaining unit members' due process rights are violated when an eligibility date for voting in an organizational change referendum election is made retroactive to a date prior to the decision of a union's Executive Board to change its organizational status, where the retroactive eligibility date precludes all bargaining unit members from becoming members of the union and participating in the organizational change process.

3. Whether a question concerning representation arises in a situation where all employees in a collective bargaining unit have been totally excluded from participation in a union organizational change process, and where a majority of these employees submit a petition to their employer following the completion of the organizational change process stating they do not wish to be represented by the surviving union.

4. Whether a union's misconduct in leading bargaining unit employees, following a Board conducted representation election but prior to certification of that union, in the takeover of a company office which results in the lawful discharge of seventeen bargaining unit employees is sufficient union misconduct to constitute an "unusual

circumstance" warranting an abridgement of the traditional one year certification rule, where a majority of the bargaining unit employees thereafter disavow representation by the offending union and where an organizational change has occurred; and whether the Board and Second Circuit erred in not allowing this issue to be litigated.

LIST OF ALL PARTIES

The caption of the case before this Honorable Court contains the names of all parties.

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OPINIONS BELOW

The underlying Board Decision, Certification of Representative, and Certification of Results of Election dated June 14, 1984 is printed in the Appendix[2] at (A-1). The Decision and Order of the National Labor Relations Board dated March 29, 1985 is reported at 274 NLRB 1442 (1985) and is printed in the Appendix at (A-4). The Supplemental Decision and Order of the National Labor Relations Board is reported at 281 NLRB No. 120 (1986) and is printed in the Appendix at (A-10). The Judgment of the United States Court of Appeals Second Circuit is reported at _____ F.2d _____ 125 LRRM 2332 (2d Cir. 1987), and is printed in the Appendix at (A-26). The Order of the United States Court of Appeals Second Circuit denying rehearing dated May 15, 1987 is printed in the Appendix at (A-32).

JURISDICTION

This Honorable Court's jurisdiction is invoked to review a Supplemental Order of the National Labor Relations Board dated September 30, 1986 (A-10) which was enforced by a Judgment of the Second Circuit Court of Appeals entered on April 8, 1987 (A-26). A timely Petition for Rehearing was filed on April 20, 1987 and was denied on May 15, 1987 (A-32). The jurisdiction of the Supreme Court is invoked pursuant to 29 U.S.C. Section 160 (e) and 28 U.S.C. Section 1254.

STATUTES INVOLVED

This case involves Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. Section 158 (a)(1) and (5) (hereafter the National Labor Relations Act, as amended, will be referred to as "the Act"). These sections read as follows:

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2. References to the Appendix will be designated "(A-_____)."

Sec. 8(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT OF THE CASE

On July 5, 1983 New England Health Care Employees Union, District 1199, RWDSU/AFL-CIO[3] (hereafter referred to as "the Union") filed a representation petition seeking to represent certain employees of New London Convalescent Home, Inc. (hereafter referred to as "New London"), the entity which the Labor Board found to be the predecessor to Petitioner. On August 26, 1983 an election was held among New London's employees pursuant to a Stipulation for Certification upon Consent Election in which the Union prevailed.

Subsequently, following the filing of a refusal to bargain charge by the Union, the General Counsel of the National Labor Relations Board on September 27, 1984, filed a Motion for Summary Judgment alleging that Petitioner had violated Sections 8(a)(1) and (5), 29 U.S.C. Section 158 (a)(1) and (5) of the National Labor Relations Act, as amended, by refusing to bargain with the Union. Petitioner had raised various defenses in its Answers, including the disaffiliation of the National Union of Hospital and Health Care Employees (hereafter referred to as "the National Union" or "NUHHCE") from the Retail, Wholesale and Department Store Union (hereafter referred to as "RWDSU"),

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3. The Union's name has been altered following the organizational change process to New England Health Care Employees Union, District 1199, National Union of Hospital and Health Care Employees, AFL-CIO.

misconduct engaged in by the Union which resulted in the discharge of numerous bargaining unit employees, and the Union's loss of majority status. While the Board rejected various of Petitioner's arguments, it did direct that a hearing be held on the disaffiliation issue. Contrary to the majority holding, Chairman Dotson would have also included for hearing various other issues raised by Petitioner, including:

> ...the Union's purported loss of majority status and alleged misconduct as well as the appropriateness of the unit stipulated to by the former Employer herein and the successorship question. (A-8)

Prior to the certification of the Union, certain significant events had transpired. In March, 1984 the sale of New London was finalized. Also, prior to the Union's certification but subsequent to the election held among bargaining unit members, the National Union's leadership began seeking the right to disaffiliate from the RWDSU and to obtain a charter directly from the AFL-CIO. The leadership of the New York Local of the National Union, the largest and most significant of the National Union's locals, which alone comprised more than 50% of the entire membership of the National Union and which supplied a disproportionately higher percentage of the National Union's funds, objected to any disaffiliation from the RWDSU. Over the objection from the New York Local, the National Union at its December, 1983 convention voted to take all steps to protect the National Union from the RWDSU, including possible disaffiliation from the RWDSU. Litigation ensued between the RWDSU, National Union and the New York Local which culminated in a stipulation to settle all matters which was entered into by the National Union, RWDSU and New York Local on May 3, 1984. By the terms of the settlement agreement the National Union was granted the unrestricted right to disaffiliate, secede or withdraw from the RWDSU. In addition, the New York Local was separated from the National Union. Having been given this right to disaffiliate, the National Union, at its Executive Board meeting on June 6, 1984, shortly before the Board's certification issued involving Petitioner's employees, voted to disaffiliate from the RWDSU effective October 1, 1984.

No one, either member or non-member of the National Union, was given an opportunity to vote on whether the National Union should disaffiliate from the RWDSU. The parties stipulated in pertinent part before the Labor Board:

> 12. On June 6, 1984, the Executive Board of the NUHHCE voted to serve notice of its intention to disaffiliate from the RWDSU effective October 1, 1984. No member of the NUHHCE or non-members represented by the NUHHCE were given an opportunity to vote on whether NUHHCE should disaffiliate from the RWDSU. The Board also voted to advise the AFL-CIO of its intention to accept an independent charter from the AFL-CIO, effective October 1, 1984...

Subsequently, after the National Union had already served notice of its disaffiliation from the RWDSU, the National Union conducted a referendum election in which members were allowed to vote, not on the disaffiliation, but rather on whether the National Union should accept a direct charter from the AFL-CIO. As stated, the National Union's relationship to the RWDSU was never voted upon by the National Union's membership. None of Petitioner's employees were offered the opportunity to vote in the National Union referendum election as none were members of the National Union. In addition, no notice was given to any of Petitioner's unit employees regarding the impending referendum election, as none were eligible members. Also, the National Union chose to utilize an eligibility date for voting in the referendum election of April 30, 1984, a date which was prior to both the action of the National Union's Executive Board disaffiliating from the RWDSU as well as the certification which issued to the Union.

Following the conclusion of the disaffiliation process the National Union's membership had fallen from approximately 140,000 members down to approximately 68,000 members. Moreover, at the time of the certification election in this matter, the National Union had been part of the RWDSU, a more than 300,000 member organization. The loss of revenue to the National Union caused by the separation of the New York Local from the National Union was significant. The testimony at

the unfair labor practice hearing before the Board revealed the New York Local had been paying per capita taxes to the National Union on close to 100,000 members, including retirees. The New York Local was providing 70% of the income of the National Union even though their membership total was a little over half of the total National Union membership. This money provided by the New York Local had amounted to a surplus of approximately $70,000 per month to the National Union. In addition, the New York Local had been providing 75–80% of the pension fund monies, 70–80% of the health and welfare fund monies and 70–80% of the National Union's strike fund. Moreover, the National Union had been using the strike fund money as a source of loans. All of these financial resources were now lost as a result of the disaffiliation process.

While none of Petitioner's employees were afforded the opportunity to vote in the referendum balloting, following the National Union's decision to disaffiliate, a majority of the bargaining unit employees of Petitioner did present a petition to Petitioner stating they did *not* want to be represented by the Union.

On June 30, 1986 Administrative Law Judge Julius Cohn issued his Supplemental Decision. In this Supplemental Decision Judge Cohn, relying principally upon this Honorable Court's decision in *Sea-First,* held that Petitioner had violated Sections 8(a) (1) and (5) of the Act (A-14).

The Board on September 30, 1986 issued its Supplemental Decision and Order in which it affirmed the Administrative Law Judge's Supplemental Decision (A-10). On January 7, 1987, the National Labor Relations Board filed an application for Enforcement of a Supplemental Order of the National Labor Relations Board with the United States Court of Appeals for the Second Circuit. The basis for that court's federal jurisdiction is Section 29 U.S.C. Section 160 (e). The United States Court of Appeals for the Second Circuit on April 8, 1987, enforced the Board's Order (A-26) and on May 15, 1987 that Court denied Petitioner's Petition for Rehearing *In Banc.* By Order dated May 28, 1987 that Court stayed issuance of its mandate for

thirty days pending Petitioner's application for a writ of *certiorari*. By order dated June 22, 1987 the Second Circuit vacated its stay of mandate.

ARGUMENT

I. *The Opinion Of The United States Court Of Appeals For The Second Circuit Conflicts With Opinions Entered By Other Circuit Courts Of Appeals And Misapplies Decisions Of This Honorable Court.*

A. *The failure of the National Union and the Union to allow bargaining unit personnel to participate in the organizational change process requires nonenforcement of the Board's Order.*

While this Honorable Court in *Sea-First* made clear that the Board's new policy as set forth in *Amoco Production Company*, 262 NLRB 1241 (1982) ("*Amoco IV*") was erroneous as it required the participation of non-union members in an organizational change context, this Court did not reverse the Board's long-standing policy which guaranteed due process rights for bargaining unit members. As noted previously, the parties stipulated that no one, member or non-member, was given the opportunity to vote on whether the National Union should disaffiliate from the RWDSU. Moreover, the president of the National Union testified that none of Petitioner's employees were offered the opportunity to vote in the National Union referendum election concerning direct affiliation with the AFL-CIO as none were members of the National Union. It must be understood that the eligibility date which was utilized to determine eligibility to vote in the referendum election was a date which preceded both the certification of the Union among Petitioner's bargaining unit employees and the decision of the National Union's Executive Board to disaffiliate from its parent organization, the RWDSU. This retroactive eligibility date precluded any bargaining unit member from becoming a member of the Union and participating in even the referendum election.

The First Circuit Court of Appeals in *NLRB v. Insulfab Plastics*, 789 F.2d 961 (1st Cir. 1986) (which was decided following this Court's decision in *Sea-First*), has recognized:

> Under the Board's current test, an employer must continue to bargain with the existing bargaining agent if two conditions are met. See *NLRB v. Financial Institution Employees, Local 1182*, ____ U.S. ____, ____ 106 S. Ct. 1007, 1012, 89 L.Ed.2d 151 (1986). First, *the employees in the bargaining unit* must have had a fair opportunity, with adequate due process safeguards, to approve the organizational change ... Second, there must be "substantial continuity" between the pre-affiliation and the post-affiliation union. 789 F.2d at 965 (Emphasis added.)

Consequently, the First Circuit has held even after *Sea-First* that there must be due process for *unit employees;* they "must" be allowed to approve or disapprove the organizational change. In the instant matter, however, no one, member or non-member of the National Union, was allowed to vote on the disaffiliation of the National Union from the RWDSU. Similarly, no unit member was allowed to vote in the referendum election. The Second Circuit's opinion therefore directly conflicts with the due process guarantees required by the First Circuit.

While Petitioner does not question that portion of the Second Circuit's opinion which held that a union may properly limit voting on organizational changes to its members (A-29), that Court went on to state:

> ...[T]he fact that this may disenfranchise some of the employees of the bargaining unit is of no consequence; those employees were free to join the union if they wished to participate in its internal affairs. (A-29)

This quote sets forth a major misconception and error by the Court of Appeals.

Clearly not only were "some of the employees of the bargaining unit" disenfranchised, but instead *all* were disenfranchised. Contrary

to the Second Circuit, bargaining unit employees were not free to join the Union in order to participate in the organizational change process. No one, either member or non-member, was allowed to participate in the decision to disaffiliate the National Union from the RWDSU. Moreover, by utilizing a retroactive eligibility date which preceded both the National Union's decision to disaffiliate from the RWDSU as well as the certification of the Union at Petitioner's facility, no one in Petitioner's bargaining unit was able to join the Union in order to participate in the organizational change process. This retroactive eligibility date denied every bargaining unit member the "fair opportunity with adequate due process safeguards to approve the organizational change," which the First Circuit mandated in *Insulfab.*

1. *The use of a retroactive eligibility date is contrary to what occurred in Sea-First and Amoco IV.*

It is essential to understand that in both *Sea-First* and in *Amoco IV* (which *Sea-First* reversed regarding non-member participation in organizational change contexts), each union took the necessary steps to inform *all* unit employees of the pending affiliation vote and specifically took steps to contact non-union members to explain to them eligibility standards. Unlike the instant matter, where an eligibility date prior to the decision of the National Union's Executive Board to disaffiliate from the RWDSU was used to determine eligibility in the referendum election, a prospective eligibility date was utilized in both *Sea-First* and *Amoco IV.* Representatives of the union were specifically instructed in *Sea-First* to:

> ...contact all unit employees and inform them of the pending affiliation vote and specifically to contact nonmembers and explain to them the eligibility standards. *Seattle-First National Bank,* 241 NLRB 751 (1979).

Also, a letter was concurrently sent to "all" unit employees informing them of this information. In *Amoco IV,* while participation in the affiliation process was limited to members only, at various meetings held by the union the union explained that membership and voting eligibility could be acquired by non-members by simply signing a dues

deduction form. Significantly, some employees of Amoco who had not previously been members of the union did execute such forms and did vote in the election. See *Amoco Production Company,* 220 NLRB 861, 863 (1975).

Neither the National Union nor the Union took any such action in the instant matter. Unlike what occurred in *Sea-First* and *Amoco IV,* no notice whatsoever was given to Petitioner's employees. The fact that Petitioner's employees were not given notification and not informed about the steps necessary to become members of the National Union should they so desire further establishes that bargaining unit due process rights were violated.

In *Coca-Cola Bottling Co. of Memphis,* 239 NLRB 1199 (1979), enf'd 616 F.2,d 949 (6th Cir. 1980), the Board in an organizational change case decided before it altered its case law in *Amoco IV,* focusing on the notice to bargaining members, stated that all members and non-members in that matter who chose to become members, were given an opportunity to vote and:

> There was adequate and proper notice, discussion, time for reflection, an orderly vote, reasonable precautions to maintain the secrecy of the ballots, *and nonmembers were not foreclosed from an opportunity to become members and to then participate in the election.* 239 NLRB at 1200. (Emphasis added.)

In the instant matter, unlike what occurred in *Sea-First* (reviewed by the Ninth Circuit), *Amoco IV* (reviewed by the Fifth Circuit), and *Coca-Cola* (reviewed by the Sixth Circuit), the Second Circuit and Board have sanctioned an eligibility date prior to the disaffiliation decision made by the Executive Board which prevented any of Petitioner's unit employees from becoming members and participating in the organizational change process.

2. *Long established case law existing prior to the Board's change of policy in Amoco IV mandated bargaining unit participation in a union organizational change.*

Petitioner is certainly not contending to this Honorable Court that after *Sea-First* non-members must be afforded the ability to participate

in the organizational change process. Petitioner does contend, however, that members of a bargaining unit cannot be totally precluded from participating in the organizational change process. Unit members must be given an opportunity to join a union in order to participate in the organizational change process. In any bargaining unit where participation of unit employees is precluded, a question concerning representation should be found to exist where bargaining unit members, as has occurred here, disavow representation by the entity which emerges from the organizational change.

Indeed, while the *Amoco IV* decision was decided in 1982 and was a departure from existing law, for approximately twenty years prior to *Amoco IV* the Board and courts had required a union to allow bargaining unit members to participate in the organizational change process. Petitioner submits that this substantial body of law has remained unaffected by *Sea-First*.

In *Yale Manufacturing Company, Inc.*, 157 NLRB 597 (1966), the Board refused to amend the certification of a union where none of the employees in the bargaining unit had been allowed to participate in a vote transferring bargaining rights from one local of the Carpenters' Union to another. Later, in *Rinker Materials Corp.*, 162 NLRB 1688 (1967), the Board refused to amend a union's certification following a merger of one Teamster Local with another. While the petitioner in that matter asserted that the merger was effective by a vote of the executive boards and membership of both local unions, it appeared that the unit employees did not participate in the decision to merge the certified union with the other Teamster Local. Without unit participation, the proposed amendment to the union's certification was deemed inappropriate.

In *Carriage Oldsmobile Cadillac, Inc.*, 210 NLRB 620 (1974), cited with approval by the Ninth Circuit (where *Sea-First* originated) in *Toyota Landscape Company v. Building Material and Dump Truck Drivers, Local 420*, 726 F.2d 525 (9th Cir. 1984), the Board overruled the decision of a Regional Director who granted a union's request for amendment of a previously issued certification. The Board was not satisfied that the steps taken by union officials were sufficient to obtain approval of unit employees where unit employees were only informed

of the purported transfer in representation after "the decision to transfer jurisdiction over them had already been made." 210 NLRB at 621. The Board concluded that this after the fact action was not sufficient to "meet the requirement of participation by unit employees in the decision to change their representative..." 210 NLRB at 621.

Similarly, after *Amoco IV,* in *1820 Central Park Avenue Restaurant Corp., d/b/a Charlie Brown's,* 271 NLRB 378 (1984), the Board set aside the results of a certification election without a hearing and dismissed a petition where, as here, "no employee" in the bargaining unit had an opportunity to participate in an election in which 40% of the members were severed from the union (less than the more than 50% that were severed in the instant matter). The Board concluded that where the local had been divided a structural change arose which raised a question as to continuity of representation. The Board once again stated that its primary concern in cases of this sort is the employees' desires. The Board held that given the fact that no employee in the bargaining unit had an opportunity to participate in the decision to divide the union, it was not even necessary to hold a hearing and to discuss the traditional factors which the Board otherwise might look to with regard to continuity of representation. See 271 NLRB 378 at f.n. 4.

Consequently it is clear that contrary to all of the holdings cited above, employees in Petitioner's unit were totally ignored by the National Union and the Union. No employee in the bargaining unit was given an opportunity to vote on the disaffiliation of the National Union from the RWDSU, a disaffiliation which drastically affected the National Union's revenues and which cut the size of the National Union by more than half. Significantly, no one in Petitioner's unit was given notice of the impending referendum election and indeed, no one employed by Petitioner in the unit in question was allowed to vote or could have voted in the referendum election as an inappropriate eligibility date was utilized.

This Honorable Court's decision in *Sea-First* should not have been read by the Board and Second Circuit in a manner that sanctioned the complete elimination of Petitioner's bargaining unit employees' participation in the organizational change process while at the same

time having that organizational change binding as to those employees despite their overwhelming disavowal of representation by the Union. *Sea-First* in no manner changed the requirement that bargaining unit members must be allowed to participate in the organizational change process.

B. *Where A Majority of Petitioner's Employees Have Disavowed Representation By The Union Following Their Exclusion From The Organizational Change Process, A Question Of Representation Is Raised.*

In *Sea-First* this Honorable Court recognized that employee support for a certified union may be eroded by changed circumstances. This Court also held that where an affiliation raises a question of representation, an election must be conducted to decide whether a certified union is still the choice of the majority of the unit employees. This Court stated:

> Of course, as is the case with any organizational and structural change, a new affiliation may substantially change a certified union's relationship with the employees it represents. These changed circumstances may in turn raise a "question of representation," if it is unclear whether a majority of employees continue to support the reorganized union. Thus, in these situations, the affiliation implicates the employees' right to select a bargaining representative, and to protect the employees' interests, the situation may require that the Board exercise its authority to conduct a representation election. 106 S.Ct. at 1013, 1014

This Court went on to state that if employees in a unit are dissatisfied with a decision made by union members, this decision can be challenged by a Board-conducted representation election. This Court stated:

> We repeat, dissatisfaction with the decisions union members make may be tested by a Board-conducted representation election only if it is unclear whether the reorganized union retains majority support. 106 S.Ct. 1015

Consequently, it is clear that this Court has recognized that a question of representation may be raised "if it is unclear" whether a majority of employees continue to support the reorganized union. In the instant matter there is no question but that the majority of Petitioner's employees in the unit deemed appropriate do not continue to support the reorganized Union. Petitioner has received a petition from the vast majority of its unit employees disavowing representation. Moreover, it must be remembered that this is a successorship situation in which the vast majority of Petitioner's employees never had an opportunity to vote in the original certification election. Moreover, the National Union and the Union following the organizational change are significantly different from the way they were constituted at the time of the election. To bind employees in this matter to a union not of the employees' choice is patently inappropriate where not only have the employees signed a petition disavowing representation by the Union, but also where they were never afforded an opportunity to vote on either the disaffiliation from the RWDSU or in the referendum election concerning the direct affiliation of the National Union to the AFL-CIO.

Under such circumstances, where it is so clear that changed circumstances exist and where the majority of Petitioner's employees do not wish to be represented by the Union, a question concerning representation exists as per *Sea-First.* The Board should have allowed the parties to fully litigate the Union's loss of majority status. Enforcement of the Board's order is inappropriate.

C. *The Board and Second Circuit Court Of Appeals Misapplied A Decision Of This Honorable Court Pertaining To The Union's Period of Certification.*

The Second Circuit in its decision affirming the Board stated that there is a presumption that a union retains majority support for a year following certification, citing *Brooks v. NLRB,* 75 S.Ct. 176, 348 US 96, 98 (1954) (A-29). This Honorable Court, however, in *Brooks* did not state that a certification must always be honored for a year. Instead, this Honorable Court cited existing Board law and stated:

> A certification, if based on a Board-conducted election, must be honored for a "reasonable" period, ordinarily "one year," in the absence of "unusual circumstances." 348 U.S. at 98.

This Honorable Court reasoned that the underlying purpose of the Act was to promote "industrial peace." 348 U.S. at 103. Indeed, in the instant matter the record reveals that the Union has acted contrary to the Act and has undermined rather than promoted industrial peace. Prior to the sale of the facility and the Union's certification, but following the election, a Union organizer led seventeen employees in the unauthorized occupation of the administrator's office, which resulted in the lawful discharge of those seventeen employees (A-33). Unless the Board and Second Circuit's holding obligating Petitioner to bargain are found erroneous, the remaining employees who witnessed this blatant frustration of the collective bargaining process will be saddled with a collective bargaining representative for at least 365 days and may even be forced to join the Union and pay dues or its equivalent to the Union in the non right to work state where this matter arose. Indeed, the National Union's president testified that his Union always seeks a union security clause in collective bargaining. This requirement that bargaining unit members join the Union or pay the equivalent of dues could be forced upon employees even though they have disavowed representation by this Union and even though the vast majority of Petitioner's employees in this successorship setting have never had an opportunity to vote for this Union and have never supported this Union.

In *NLRB v. Union Nacional de Trabajadores,* 540 F.2d 1 (1st Cir. 1976), that court quite correctly pointed out that:

> The one year rule has never been conceived of as affording the elected Union an absolute right to serve as collective bargaining representative until 365 days have passed... It was not intended to protect the representational status of a labor organization that had violated its obligations as a bargaining representative and frustrated the collective bargaining process. 540 F.2d at 13, f.n. 11

This Honorable Court in *NLRB v. Gissell Packing Co.*, 89 S.Ct. 1918, 395 U.S. 575 (1969), enumerated three categories of employer misconduct which are critical to any determination as to whether an employer can be obligated to bargain with a union without the necessity of an election. The first category of misconduct involves conduct involving outrageous and pervasive unfair labor practices. Under such circumstances, a bargaining order is an appropriate remedy "without need of inquiry into majority status on the basis of cards or otherwise." 395 U.S. at 613. The First Circuit in *Union Nacional de Trabajadores* in effect recognized that just as an employer's outrageous and pervasive conduct can be a basis for an affirmative bargaining order, a union's outrageous and pervasive conduct can be a basis to lose one's status as a collective bargaining representative; in effect, a negative bargaining order. This Honorable Court's decision in *Brooks* should not be used as a vehicle to give a union carte blanche to act in a fashion which is inimical to the collective bargaining process and to employees' rights. The Union led seventeen employees in a takeover of a company administrative office which clearly occurred at a time before there was any bargaining obligation. This misconduct resulted in the lawful discharge of seventeen bargaining unit employees as found by the Labor Board's General Counsel (A-33). Moreover, Petitioner asserted to the Board that this Union also led employees in picketing in violation of Section 8(g) of the Act, which could also have resulted in the discharge of employees for engaging in unlawful conduct. This Union should be found to have forfeited any status it may otherwise have as a collective bargaining representative, particularly where this Union has been rejected by the vast majority of the remaining employees. Employees should not be forced to accept this Union as their collective bargaining representative where the Union has exhibited such a glaring failure to properly represent the employees in the unit.

Petitioner submits that egregious union misconduct can be and should be found in this case to be an "unusual circumstance" sufficient to overcome the presumption of the Union's continued majority status. In a 1979 article in the University of Pennsylvania Law Review, "Union Violence and Bargaining Orders; A New Approach to *Laura Modes*,"

127 U. Pa. L. Rev. 1640 (1979), the author in discussing union misconduct stated:

> If the union is certified and the dispute occurs during the certification year, the Board should create another exception to the certification year bar for cases involving egregious union misconduct... (127 U. Pa. L. Rev. at 1664)

Here, the Union has invaded the nursing home and refused to leave the offices which they occupied, upset the patients, and its inappropriate action resulted in the discharge of the seventeen employees who were engaged in the misconduct. It has also led employees into picketing in violation of the Act. This Union, which has engaged in such misconduct, is not wanted by Petitioner's employees, employees who have never had an opportunity to vote on whether they wish to be represented by this Union and an 8(a)(5) finding was totally inappropriate under such circumstances. Chairman Dotson of the Labor Board quite correctly contended in this matter that the issue of the Union's misconduct should have been fully litigated (A-8 at f.n.4) and Petitioner submits that the Board and Second Circuit Court of Appeals erred in not concurring with Chairman Dotson's position.

Petitioner submits that it has never been the intention of this Court to allow *Brooks* to be used by a union in such a manner that it has free rein to ignore the requirements of law and trample on employee rights and yet retain its certification for a year. Where a union abuses its duty to fairly and properly represent employees as has occurred here, the certification year should be forfeited.

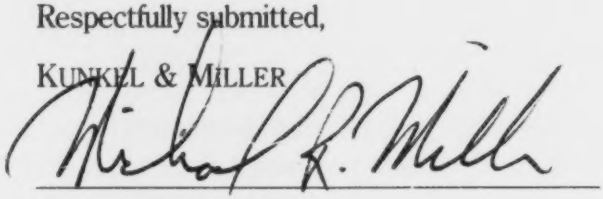
Petitioner respectfully submits that this Honorable Court's 1954 opinion in *Brooks* should be revisited in light of the Board's and Second Circuit's misapplication of that case and this Honorable Court should clarify that *Brooks* allows both the Board and courts to find that egregious union misconduct is a sufficient "unusual circumstance" to raise a question concerning representation even during a certification year.

CONCLUSION

For the foregoing reasons Petitioner respectfully submits this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

KUNKEL & MILLER



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Counsel for Petitioner

APPENDIX

APPENDIX

NOT TO BE INCLUDED IN BOUND VOLUMES

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

NEW LONDON CONVALESCENT HOME, INC.

Employer

and

Case 39-RC—450
Dated 14 June 1984

NEW ENGLAND HEALTH CARE EMPLOYEES UNION, DISTRICT 1199, RWDSU/AFL-CIO

Petitioner

DECISION, CERTIFICATION OF REPRESENTATIVE, AND CERTIFICATION OF RESULTS OF ELECTION

The National Labor Relations Board, by a three-member panel, has considered objections to an election held 26 August 1983 and the Hearing Officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement.[1]

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1. The appropriate collective-bargaining units, as set forth in the Stipulaton, are as follows:

   VOTING GROUP A (Professional Group)

   All registered nurses employed by the Employer but excluding all other professional employees and the in-service director, all technical employees, all service and maintenance employees, office clerical employees, and guards and supervisors as defined in the Act.

   VOTING GROUP B (Technical Group)

   All technical employees employed by the Employer, including, but not limited to, licensed practical nurses, recreation directors and beauticians; excluding all registered nurses, all other professional employees, all service and maintenance employees, office clerical employees, and guards and supervisors as defined in the Act.

   The Stipulation also provided that if a majority of the professional employees in Voting Group A voted to be included in a unit with the non-professional employees in Voting Group B, the ballots would be counted together and Groups A and B would constitute one unit. (continued)

The Board having reviewed the record in light of the exceptions and briefs, has adopted the Hearing Officer's findings and recommendations, and finds that a certification of representative should be issued for one of the bargaining units and that a certification of results of election should be issued for the other bargaining unit.[2]

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for New England Health Care Employees Union, District 1199, RWDSU/AFL—CIO and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All service and maintenance employees employed by the Employer including nurses' aides, dietary employees, housekeeping employees, laundry employees, and maintenance employees; excluding all registered nurses, all other professional employees and technical employees including, but not limited to, licensed practical nurses, recreation directors, and beauticians, office clerical employees, and guards and supervisors as defined in the Act.

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1. SERVICE AND MAINTENANCE UNIT

All service and maintenance employees employed by the Employer including nurses' aides, dietary employees, housekeeping employees, laundry employees, and maintenance employees; excluding all registered nurses, all other professional employees and technical employees including, but not limited to, licensed practical nurses, recreation directors, and beauticians, office clerical employees, and guards and supervisors as defined in the Act.

The tally of ballots showed that a majority of the professional employees in Voting Group A wished to be included in a unit with the non-professional employees in Voting Group B. Accordingly, the ballots from Voting Group A were mingled and counted with the ballots from Voting Group B. The tally of ballots for Voting Groups A and B shows 9 votes for and 14 votes against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.

The tally of ballots for the service and maintenance unit shows 42 votes for and 17 votes against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.

2. We hereby deny the Purchaser's Motion to Intervene.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for New England Health Care Employees Union, District 1199, RWDSU/AFL—CIO and that it is not the exclusive representative of the employees in the following appropriate unit:

> All registered nurses and technical employees employed by the Employer, including, but not limited to, licensed practical nurses, recreation directors and beauticians, but excluding all other professional employees and the in-service director, all service and maintenance employees, office clerical employees, and guards and supervisors as defined in the Act.

Dated, Washington, D.C., 14 June 1984.

Don A. Zimmerman, Member

Robert P. Hunter, Member

Patricia Diaz Dennis, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

274 NLRB 1442

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

EASTERN CONNECTICUT HEALTH SERVICES, INC.
d/b/a NEW LONDON CONVALESCENT HOME

and

Case 39-CA—2265

Dated 29 March 1985

NEW ENGLAND HEALTH CARE EMPLOYEES UNION, DISTRICT 1199, RWDSU, AFL—CIO

DECISION AND ORDER

Upon a charge filed by the Union 23 July 1984 and amended 5 September 1984, the General Counsel of the National Labor Relations Board issued a complaint 6 September 1984 against the Company, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 14 June 1984, following a Board election in Case 39—RC—450, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. [Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); *Frontier Hotel,* 265 NLRB 343 (1982).] The complaint further alleges that since 22 June 1984 the Company has refused to bargain with the Union. On 15 September 1984 the Company filed its answer admitting in part and denying in part the allegations in the complaint, submitting affirmative defenses, and requesting that the complaint be dismissed in its entirety.

On 1 October 1984 the General Counsel filed a Motion for Summary Judgment. On 3 October 1984 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed a response.

Ruling on Motion for Summary Judgment

The Company's answer admits its refusal to bargain, but raises certain affirmative defenses. The Company contends that it is not the successor to the previous owner, New London Convalescent Home, Inc. (New London), in whose name the Board's Decision and Certification of Representative issued.[1] The Company also contends that if it is a successor, the Union's certification is invalid because the unit is inappropriate and the Union engaged in objectionable conduct during the election campaign. Further, the Company asserts that since the election the Union has engaged in egregious misconduct which warrants revocation of its certification. Finally, the Company argues that its refusal to bargain did not violate Section 8(a)(5) because the Union's postcertification change in national affiliation was invalid under the standards set forth in *Amoco Production Co.*, 262 NLRB 1240 (1982).

The General Counsel contends that the Company has admitted in its answer sufficient facts to establish that it is a successor to New London and that the Company's "pro forma" denial raises no material issues of fact warranting a hearing. The General Counsel further argues that the Company's defense that the Certification of Representative is invalid similarly raises no material issue of fact, but merely seeks to relitigate issues litigated and decided in the prior representation proceeding. In this regard, the General Counsel asserts that the Company has failed to allege that it has any newly discovered or previously unavailable evidence.

The record, including the record in Case 39—RC—450, reveal that an election was held 16 August 1983 pursuant to a Stipulated Election Agreement. The tally of ballots shows that of approximately 66 eligible voters, 42 cast valid ballots for and 17

1. Not included in bound volumes.

against the Union; there was 1 challenged ballot, an insufficient number to affect the results of the election. After conducting a hearing on New London's objections, the hearing officer on 5 December 1983 issued his report recommending that the objections be overruled and denying the Company's motion to reopen the record. New London and the Company filed separate exceptions to the recommendation. On 14 June 1984 the Board adopted the hearing officer's recommendations, denied the Company's motion to intervene, and certified the Union as the exclusive bargaining representative of the employees in the stipulated unit.

By mailgram on 22 June 1984 the Union requested the Company to bargain collectively with it concerning the wages, hours, and other terms and conditions of employment of the unit employees. Since 22 June 1984 the Company has failed and refused to bargain collectively with the Union.

With respect to the Company's contention that it is not a successor to New London, the Company's answer reveals that up until 22 March 1984 New London operated a nursing home at the facility at issue here providing inpatient medical and professional services to geriatric patients, and that on 22 March 1984 the Company purchased the assets, property, and business of New London and since that date has operated the nursing home providing inpatient medical and professional services. The Company also admits that since 22 March 1984 it has been engaged in the same business operations as New London at the same location and "has, as a majority of its employees, individuals who were previously employees of" New London.

The Board's traditional test for successorship status, affirmed by the Supreme Court in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), is whether there is a continuity in the employing enterprise. We find that the Company has admitted facts sufficient to show substantial continuity in this case. Thus the Company admits that (1) it purchased the property and business of New London; (2) it has continued to operate the same business at the

same location; (3) it has provided the same services without any interruption; and (4) a majority of its employees were previously employed by New London. Accordingly, we conclude that the Company is a successor to New London and therefore had a duty to recognize and bargain with the certified collective-bargaining representative of its employees on and since 14 June 1984.[2]

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

The issues raised by the Company regarding the unit scope and alleged objectionable conduct were or could have been litigated in the prior representation proceeding. The Company does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.

Further we find no merit in the Company's contention that the Union has engaged in egregious misconduct sufficient to warrant revocation of its certification and relieve the Company of any obligation to bargain with the Union. In addition, we find no material issue raised by the Company's assertion that the alleged misconduct, the change in ownership, and alleged employee turnover constitute "unusual circumstances" sufficient to overcome the presumption of the Union's continued majority status. Accordingly, as to the aforementioned contentions, we find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding.[3]

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2. See *Canterbury Villa of Waterford, Inc.*, 271 NLRB No. 23 (July 10, 1984).

3. See *Brooks v. NLRB*, 348 U.S. 96 (1954).

We find, however, that the Company's answer raises material issues with respect to the Union's disaffiliation from the Retail, Wholesale and Department Store Union and its affiliation with the National Union of Hospital and Health Care Employees.[4] The Company's allegation that bargaining unit members neither were notified of, nor given an opportunity to vote on, the Union's reaffiliation raises issues of fact and law under *Amoco Production Co.*, 262 NLRB 1240 (1982). Accordingly, we shall order a hearing limited to the issue of whether the Union's reaffiliation after the certification comported with the due process standards set forth in *Amoco*, and therefore whether the Company was obligated to bargain with the reaffiliated Union.

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4. Chairman Dotson did not participate in the underlying representation proceeding but agrees that a hearing is required on the disaffiliation and affiliation issues. Contrary to his colleagues, however, the Chairman would include for hearing the issues raised as to the Union's purported loss of majority status and alleged misconduct as well as the appropriateness of the unit stipulated to by the former Employer herein and the successorship question.

ORDER

It is ordered that this proceeding is remanded to the officer in charge for Subregion 39 for the purpose of arranging and giving notice of a hearing before an administrative law judge, at which hearing the validity of the Union's affiliation with the National Union of Hospital and Health Care Employees shall be determined under the standards set forth in *Amoco Production Co.*, 262 NLRB 1240 (1982).

Dated, Washington, D.C., 29 March 1985.

Donald L. Dotson, Chairman

Robert P. Hunter, Member

Patricia Diaz Dennis, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

281 NLRB No. 120

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

EASTERN CONNECTICUT HEALTH SERVICES, INC.
d/b/a NEW LONDON CONVALESCENT HOME

and

Case 39-CA—-2265
Dated 30 September 1986

NEW ENGLAND HEALTH CARE EMPLOYEES UNION, DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, AFL—CIO[1]

SUPPLEMENTAL DECISION AND ORDER

On 30 June 1986 Administrative Law Judge Julius Cohn issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a cross-exception, and both the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order.[3]

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1. We amend the caption herein and in *New London Convalescent Home*, 274 NLRB No. 204 (Mar. 29, 1985), to reflect the correct name of the Charging Party.

2. We find it unnecessary to rely on the judge's conclusion that members' approval of the direct affiliation necessarily constituted implied approval of the prior disaffiliation.

3. In accord with the General Counsel's cross-exception, we shall substitute a notice deleting an inadvertent typographical error.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Eastern Connecticut Health Services, Inc. d/b/a New London Convalescent Home, Waterford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

Dated, Washington, D.C., 30 September 1986.

Donald L. Dotson, Chairman

Wilford W. Johansen, Member

Marshall B. Babson, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with New England Health Care Employees Union, District 1199, National Union of Hospital and Health Care Employees, AFL—CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

NOTICE TO EMPLOYEES

(Continued)

All service and maintenance employees, including nurses' aides, dietary employees, housekeeping employees, laundry employees, and maintenance employees; excluding all registered nurses, all other professional employees and technical employees including, but not limited to, licensed practical nurses, recreation directors, and beauticians, office clerical employees, and guards and supervisors as defined in the Act.

EASTERN CONNECTICUT HEALTH
SERVICES, INC., d/b/a NEW
LONDON CONVALESCENT HOME

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Subregion 39, One Commercial Plaza, 21st Floor, Hartford, Connecticut 06103, Telephone 203-722-3373.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

EASTERN CONNECTICUT HEALTH SERVICES, INC.
d/b/a NEW LONDON CONVALESCENT HOME

and Case 39-CA—2265

NEW ENGLAND HEALTH CARE EMPLOYEES UNION,
DISTRICT 1199, RWDSU, AFL—CIO

Thomas W. Meiklejohn, Esq.,
of Hartford, CT, for the
General Counsel.

Michael Miller, Esq.
(Kunkel & Miller)
of St. Petersburg, FL,
for Respondent.

Miriam L. Gafney, Esq.
(Freedman & Lorry, P.C.),
of Philadelphia, PA,
for the Charging Party.

SUPPLEMENTAL DECISION

Statement of the Case

JULIUS COHN, Administrative Law Judge: On 29 March 1985 the Board issued a Decision and Order in the above-entitled proceeding, 274 NLRB No. 204. This was based upon consideration by the Board of a Motion for Summary Judgment made by General Counsel requesting that an order be entered directing Eastern Connecticut Health Services, Inc., d/b/a New London Convalescent Home, herein called Respondent, to bargain with New England Health

Care Employees Union, District 1199, RWDSU, AFL—CIO (NEHCEU). The Board found, with the exception of one contention, that Respondent had failed to raise any other issue "properly litigible in this unfair labor practice proceeding." The Board did find, however, that Respondent had raised a material issue with respect to "the Union's disaffiliation from the Retail, Wholesale and Department Store Union and its affiliation with the National Union of Hospital and Health Care Employees." The Board concluded that a hearing should be held limited to the issue of whether the Union's reaffiliation after the certification comported with the due process standard set forth in *Amoco Production Co.*, 262 NLRB 1240 (1982). For this purpose the Board remanded the proceeding for hearing before an Administrative Law Judge. By designation of the Associate Chief Administrative Law Judge, the undersigned conducted such hearing on 16 December 1985 and 22 January 1986 at Hartford, Connecticut.[1]

All parties were given full opportunity to submit evidence relevant to the Board's order and remand. Following the close of hearing, General Counsel, Charging Party, and Respondent submitted briefs. These together with supplemental briefs filed by all parties have been carefully considered.

Upon the entire record[2] of the remanded hearing and from my observation of the witnesses, I make the following:[3]

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1. In accordance with the understanding of the parties and their agreement, the hearing dealt with the issue of the affect of the disaffiliation of the National Union of Hospital and Health Care Employees from the Retail, Wholesale and Department Store Union (RWDSU), AFL—CIO, and its simultaneous direct affiliation with AFL—CIO.
2. Following the close of hearing, Respondent made a Motion to Correct Transcript. As this Motion refers to typographical and other minor errors, and there being no opposition, the Motion is granted.
3. At the hearing the parties stipulated to the introduction and receipt of the transcript and exhibits (other than the formal papers), of another proceeding dealing with the same issue. That case is Canterbury Villa of Waterford, Inc., Case No. 39-CA-1797. A Supplemental Decision by the undersigned is being issued simultaneously with the instant case.

I. Additional Findings of Fact and Conclusions

A. The Voting Issue

The stated purpose of the remanded hearing is to take evidence on the issue arising from an allegation that employees were not afforded the opportunity of voting on a change in affiliation of NEHCEU. The fact of this issue is resolved, at this point, in a simple stipulation of the parties that "no member of the NUHHCE or non-members represented by the NUHHCE were given an opportunity to vote on whether NUHHCE should disaffiliate from the RWDSU."[4] However a brief statement of background facts, all stipulated or uncontradicted, will bring the issue into clearer focus.

At the time of the representation election conducted among Respondent's employees in 1983, there were 11 geographic districts, of which NEHCEU was one, all affiliated with the National. The National itself was established in 1973, and its Constitution provided that it "be deemed for all purposes a single indivisible entity of the Retail, Wholesale & Department Store Union, (RWDSU), AFL-CIO." Further it stated that the National shall issue certificates of affiliation to its Districts, and that relationships by Districts with the RWDSU shall be through the National. On 1 September 1979 NEHCEU received its "Certificate of Affiliation" as a District from the National.

Problems concerning the relationship between RWDSU and National began in 1982 when RWDSU amended its constitution to provide that an affiliate could not secede or disaffiliate without approval of the RWDSU Executive Board. This was a right which had been previously guaranteed by RWDSU to its affiliates. Other events occurred, including an attempt by RWDSU to impose a Trusteeship on the National, all of which led to litigation.

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4. National Union of Hospital and Health Care Employees, herein described as NUHHCE or National, is the "National Union" with which NEHCEU is affiliated.

In February 1984, a request by the National for a separate charter from AFL—CIO was rejected. However on 3 May 1984 a settlement agreement, approved by the U.S. District Court, was executed by RWDSU, the National and, the New York District 1199. As a result, RWDSU and the National jointly requested AFL—CIO to offer an independent charter to the National, which was granted by the AFL—CIO Executive Council on 7 May, 1984.

Thereafter on 6 June 1984, the Executive Board of NUHHCE voted to disaffiliate from RWDSU, effective 1 October. Neither members or non-members represented by NUHHCE voted on this issue of disaffiliation. The Executive Board also voted to advise AFL—CIO of its intention to accept an independent charter from AFL—CIO effective 1 October. These decisions were implemented in writing by President Henry Nicholas of the National. It should be noted, at this point, that New York District 1199, a party to the Court settlement, was not included in these decisions, since it had determined to remain as a division or affiliate of RWDSU, and disaffiliate from the National.

Pursuant to a notice to all its Districts and areas, dated 13 July 1984, and a mailing on 31 July 1984, the National conducted a referendum by mail ballot in which members voted to approve or disapprove amendments to the Constitution of the National and direct affiliation with AFL—CIO. Ballots were mailed to all members in good standing as of 30 April 1984. A substantial number of Respondent's employees in the unit found appropriate herein were not in that category and, therefore, did not have an opportunity to vote in this referendum.

The AFL—CIO chartered NUHHCE (National) as of 1 October 1984. On the same the National, now an AFL—CIO affiliate, issued a new Certificate of Affiliation to District 1199 NE, New England Health Care Employees Union.

While these events involving disaffiliation by the National from RWDSU, and direct affiliation with AFL—CIO were occurring, the voting issue had to be considered in the light of the Board's decision in *Amoco Production Co.*, 262 NLRB 1240 (1982), *aff'd sub nom Local Union No. 4-14, Oil Chemical and Atomic Workers v NLRB*, 721 F.2d 150 (5th Cir. 1983) *(Amoco IV)*. In that case, the Board held that an

employer was not required to bargain with an independent union whose members voted to affiliate with Oil Chemical and Atomic Workers International Union, AFL—CIO. The reason therefor was that non-members of the independent were not permitted to vote. Respondent herein relied on *Amoco IV* and cases following it, as did the Board in remanding this case for hearing.

However, subsequent to the close of this remanded hearing, the Supreme Court had occasion to rule on this voting issue. In *NLRB v Financial Institution Employees of America, etc., et al; and Seattle-First National Bank v Financial Institution Employees of America, etc., et al.* 106 Sup. Ct. 1007 (26 February 1986), *(Sea-First),* the Court reversed *Amoco IV* and its progeny, holding "that the Board exceeded its authority under the Act in requiring that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union." The Court relied on statutory policy that matters of affiliation/disaffiliation are internal union affairs with which the Board is precluded from interfering. Accordingly Respondent's principal contention herein, that it be relieved of its duty to bargain because of non-members not voting, is effectively denied by *Sea-First.* However the Court did say that in a situation where the changes wrought by affiliation are such that a question of representation is raised, the Board may conduct a representation election.

B. The Organization and Structure Issue

General Counsel urges dismissal of Respondent's defense on the narrow ground that the Board's remand is literally confined to the voting issue. However the hearing on the remand was conducted pre-*Sea-First* when *Amoco IV* was still viable. As it is stipulated that a "substantial" number of the unit employees, members or non-members did not vote, General Counsel was forced to litigate on the basis that, in the circumstances, voting was not even required. Thus the hearing was basically one involving the structure and organization of Charging Party Union and the National. In order that the Board may take full advantage of this record, I believe it should be discussed.

Prior to *Amoco IV,* the Board normally applied two tests to an affiliation situation. First, there had to be due process safeguards. See *Newspapers, Inc.,* 210 NLRB 8, 9 (1974). However, in considering standards for application of due process, attention must now be

directed to the *Sea-First* finding regarding unauthorized intrusion in internal union affairs. In this instance the disaffiliation of the National from RWDSU was approved by duly elected officers of the National and delegates from the Districts, who also incorporated the required changes by amendment of the Constitution of the National. Perhaps unique in this case, the disaffiliation was one of the results of litigation between the National on one side and both the RWDSU and New York District 1199 on the other. As noted the litigation was concluded by a settlement agreement providing for the disaffiliation, among other things, and that agreement was approved by a United States District Court, thereby providing judicial guidance for the process. Finally, upon notice to all Districts and members, a referendum by mail ballot was conducted in which the members approved the direct affiliation to AFL—CIO. I would conclude that members would thereby be impliedly voting approval of the disaffiliation. Respondent contends, on the basis of record testimony, that since 2000 ballots were returned by the post office because the addressee was unknown, due process was not obtained. The record further shows that more than 60,000 ballots were mailed, and the National made additional efforts to locate the 2000 members who, no doubt, failed to notify their Union of changes in address. In any case, a substantial number of ballots were counted. I find in all these circumstances that due process was observed under pre-*Amoco IV* standards, and certainly would comply with *Sea-First.*

The second test applied by the Board, as stated by the Court in *Sea-First* was one of "substantial 'continuity' between the pre and post-affiliation union. The focus of this inquiry was whether the affiliation had substantially changed the union: The Board considered such factors as whether union retained local autonomy and local officers, and continued to follow established procedures."

Applying this test, it is clear that there was more than "substantial continuity" between the pre-and-post disaffiliation union. The certified Union in the instant case is the local, NEHCEU. For all practical purposes, the entity remained intact after the National disaffiliated from RWDSU and affiliated directly with AFL—CIO. Jerome P. Brown, President of NEHCEU, testified without contradiction, that

he has been President of the New England District since 1979, and continues in that position. All other officers and staff of the District remained in the same capacities. There was no change in the manner in which officers were elected. As was the case prior to the disaffiliation, representatives of New England still serve on the Executive Board of the National. The geographical jurisdiction of the New England District is unchanged. In addition, procedures for organizing employees are the same, as are the methods for negotiation of collective-bargaining agreements and their administration by the Districts. Moreover, the RWDSU was never involved in any of these activities. Thus as far as the NEHCEU, the certified Union, is concerned, the disaffiliation was a cosmetic change. Indeed it appears that the original affiliation to RWDSU simply afforded the National and its Districts indirect access to AFL—CIO, which they now have obtained directly.

Respondent contends that there has been a "disruption of existing intraunion relationships" as a result of the disaffiliation from RWDSU. It relies on the fact that New York District 1199 remained affiliated with RWDSU, and in effect, seceded from the National. It points to the testimony of President Brown of the National, that the departure of the New York District resulted in a considerable loss of income because approximately half of the National's overall membership was lost. However to conclude that this inevitably leads to "financial instability" is speculation. The settlement agreement provided for proportionate distribution of funds between New York District 1199 and the National — the latter's pension fund, independently administered, remains intact. Clearly the loss of perhaps half of its dues-income would cause the National to run a leaner administration operation. But bigger is not always better. There is no affirmative evidence that the smaller National was in any trouble. More important, the New England District 1199 remained intact and virtually unaffected.

In support of its allegations of disruption and change, Respondent called Doris Turner as a witness. Ms. Turner had been President of New York District 1199 since 1982 and Secretary of the National from

its inception until she disaffiliated from the National in 1984. Basically she confirmed the split of her New York District 1199 from the National and the consequent loss of membership and money to the National. Ms. Turner quite candidly testified that there was very little, if any, actual assistance rendered by RWDSU to the National or its Districts. Thus RWDSU did not pay any of the salaries of the officers of the National, nor was she aware of any loans made by RWDSU to the National. She stated that RWDSU did not assist National or the Districts in bargaining. The only positive assistance her District received from RWDSU was during a strike in 1984 but it appears that this was no different than calling a sister labor union or the Central Trades and Labor Council.

The record fails to reveal any impact on NEHCEU, the Charging Party, which is the certified representative of the Respondent's employees. In sum, I find that a "substantial continuity" does, in fact, exist. Nor has a question concerning representation been raised. The Supreme Court in *Sea-First* has indicated that otherwise an affiliation vote is a purely internal union affair. See *NLRB v Insulfab Plastics, Inc., New England Division,* _____ F. 2d _____, 122 LRRM 2105 (1986).

Accordingly, on the basis of my findings above with respect to the issues raised by the Board's order remanding this proceeding, and particularly in view of the intervening Decision of the Supreme Court in *Sea-First,* I find that Respondent has not sustained its defense with regard to the validity of the National's disaffiliation from RWDSU. As the Board has already found no merit to the Respondent's other answers and defenses to the Motion for Summary Judgment, I find that Respondent has violated Section 8(a)(1) and (5) of the Act by refusing to bargain with NEHCEU.

General Counsel and Charging Party moved at the remanded hearing that the caption of this proceeding and the Board's order in 274 NLRB No. 104 be amended to reflect the correct name of the Charging Party. I recommend granting of this Motion so that the name of the Union as it appears in the caption and the Board's Order be changed to "New England Health Care Employees Union, District 1199 National Union of Hospital and Health Care Employees, AFL—CIO.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, I recommend that it be ordered to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, the initial period of the certification shall begin on the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F. 2d 600 (5th Cir. (1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F. 2d 57 (10th Cir. 1965).

Upon the foregoing findings of fact, and conclusions of law, and the entire record in this case and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[5]

The Respondent, Eastern Connecticut Health Services, Inc. d/b/a New London Convalescent Home, Waterford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargaining with New England Health Care Employees Union, District 1199, National Union of Hospital and Health Care Employees, AFL—CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of Act.

---

5. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All service and maintenance employees employed by the Employer including nurses' aides, dietary employees, housekeeping employees, laundry employees, and maintenance employees; excluding all registered nurses, all other professional employees and technical employees including, but not limited to, licensed practical nurses, recreation directors, and beauticians, office clerical employees, and guards and supervisors as defined in the Act.

(b) Post at its facility in Waterford, Connecticut, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms, provided by the officer-in-charge for Subregion 39, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the officer-in-charge in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. 30 June 1986

Julius Cohn
Administrative Law Judge

6. If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all parties had an opportunity to give evidence it has been found that we violated the National Labor Relations Act and we have been ordered to post this notice.

WE WILL NOT refuse National Union of Hospital and Health Care Employees, to bargain with New England and Health Care Employees Union, District 1199, National Union of Hospital and Health Care Employees, AFL—CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you in Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

NOTICE TO EMPLOYEES

(Continued)

All service and maintenance employees, including nurses' aides, dietary employees, housekeeping employees, laundry employees, and maintenance employees; excluding all registered nurses, all other professional employees and technical employees including, but not limited to, licensed practical nurses, recreation directors, and beauticians, office clerical employees, and guards and supervisors as defined in the Act.

EASTERN CONNECTICUT HEALTH SERVICES, INC., d/b/a NEW LONDON CONVALESCENT HOME

_____

(Employer)

Dated _____. By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of this posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Subregion 39, 750 Main Street, Room 1200, Hartford, Connecticut 06103, Telephone 203-722-2789.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1018—August Term, 1986

(Argued: March 24, 1987 Decided: April 8, 1987)

Docket No. 87-4004

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

— against —

EASTERN CONNECTICUT HEALTH SERVICES, INC., d/b/a NEW LONDON CONVALESCENT HOME,

Respondent.

NEW ENGLAND HEALTH CARE EMPLOYEES UNION, DISTRICT 1199, NATIONAL UNION OF HOSPITAL and HEALTH CARE EMPLOYEES, AFL-CIO,

Intervenor.

Before:

KAUFMAN, PIERCE and PRATT,
Circuit Judges.

Application for enforcement of a supplemental order of the National Labor Relations Board requiring an employer to bargain with its certified union.

Order enforced.

BARBARA A. ATKIN (Michael David Fox, *of counsel.* Rosemary M. Collyer, John E. Higgins, Jr., Robert E. Allens, Elliott Moore, *on the brief*), *for Petitioner.*

MICHAEL R. MILLER (Kunkel & Miller, *of counsel*), *for Respondent.*

MIRIAM L. GAFNI (Freedman & Lorry, *of counsel*), *for Intervenor.*

PER CURIAM:

The National Labor Relations Board petitions for enforcement of its supplemental order dated September 30, 1986 requiring respondent Eastern Connecticut Health Services, Inc., owner of a nursing home in New London, Connecticut (the "employer"), to bargain with

the entity now known as New England Health Care Employees Union, District 1199, National Union of Hospital and Health Care Employees, AFL-CIO (the "union").

While the employer's defenses to the petition are numerous, each of them is plainly lacking in merit under settled precedent. Certainly, the employer has adduced no reasons which would suffice for us to overturn the "wide degree of discretion" that the Board enjoys in resolving representation matters. *See NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *NLRB* v. *Semco Printing Center, Inc.*, 721 F.2d 886, 892 (2d Cir. 1983).

At the time of the certification election, the union was affiliated with the AFL-CIO through the Retail, Wholesale, and Department Store Union and the nursing home was owned by a predecessor employer. Subsequently, the union changed its affiliation and is now affiliated with the AFL-CIO directly. The employer argues that as a result of this change there must be a new certification election.

Under the standards set forth by the Supreme Court in *NLRB* v. *Financial Institution Employees Local 1182*, 106 S.Ct. 1007 (1986) ("Sea-First"), the employer's contention must be analyzed in two parts. First, there must be a finding that the union's new affiliation "substantially change[d] a certified union's relationship with the employees it represents." If so, the second inquiry is whether "it is unclear whether a majority of employees continue to support the reorganized union," *id.*, 106 S.Ct. at 1013. In this case, the Board's detailed findings of fact following a hearing amply warrant its conclusion that the first part of this test has not been met here.

In any event, the facts alleged by the employer do not suffice to raise a substantial question as to the second part

of the test. The employer complains that non-members of the union were not permitted to vote on the organizational changes. A union may properly limit voting on such questions to its members, *Sea-First,* 106 S.Ct. at 1014, 1017, and the fact that this may disenfranchise some of the employees of the bargaining unit is of no consequence; those employees were free to join the union if they wished to participate in its internal affairs.

Similarly, since the affiliation decision was primarily an internal matter for the union, *id.,* 106 S.Ct. at 1015-16, no question of representation is raised by the union's decision not to require unit-by-unit approval of the changes, or its delegation of parts of the process to its executive board. Neither these union procedures, nor any of the claimed irregularities in the way in which the referendum on the new affiliation was conducted, resulted in a denial of the essential elements of due process. Indeed, the record supports the finding of the Board that the union affirmatively sought to insure that all eligible workers wishing to vote had the opportunity to do so.

The employer's next series of claims concerns its contention that "unusual circumstances", in the form of alleged union misconduct, exist here and suffice to rebut the ordinary presumption that a union retains majority support for a year following certification. *See Brooks* v. *NLRB,* 348 U.S. 96, 98 (1954); *Glomac Plastics, Inc.* v. *NLRB,* 592 F.2d 94, 98 n.3 (2d Cir. 1979). Particularly since the Board is entitled to view such claims with skepticism when made by employers rather than employees, *see Retired Persons Pharmacy* v. *NLRB,* 519 F.2d 486, 490 (2d Cir. 1975), the instances of misconduct alleged by the employer—the brief occupation of an administrative office, and a single instance of assertedly illegal picketing

—do not rise to the level of egregiousness which would warrant us in concluding that the Board abused its discretion in requiring the employer to bargain with the union.

The employer's claim that there was such abuse is based on its contention that the instances of claimed union misconduct cost the union its majority support. Even if true, that allegation would not establish "unusual circumstances" justifying a refusal to bargain. *See NLRB* v. *Lee Office Equipment,* 572 F.2d 704, 706-07 (9th Cir. 1978).

The employer next makes several procedural attacks on the Board proceedings. None have merit. The Board's decision to deny the employer intervention in the administrative proceedings while it was still only a prospective purchaser of the nursing home at issue was well within the Board's authority.

Similarly, there was no abuse of discretion in holding that the employer was bound by a stipulation as to the appropriate bargaining unit entered into by its predecessor in interest. The bargaining obligations of successor employers are well established, *see NLRB* v. *Cablevision Systems Development Co.,* 671 F.2d 737, 739 (2d Cir. 1982), and the employer's duties under an agreement voluntarily entered into by its predecessor are in no way diminished because the predecessor might arguably have litigated the matter successfully or because the employer assertedly could do so now. Accordingly, the Board was not required to provide an articulation of why the bargaining unit stipulated to by the employer's predecessor met the standards laid down in contested cases.

Having examined each of the employer's contentions, and finding all of them to be meritless, we hold that the Board is entitled to enforcement of its supplemental order.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 15th day of May one thousand nine hundred and eighty-seven.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

Docket No. 87-4004

EASTERN CONNECTICUT HEALTH SERVICES, INC. d/b/a NEW LONDON CONVALESCENT HOME,
Respondent,

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Respondent, Eastern Connecticut Health Services, Inc. d/b/a New London Convalescent Home.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

June 29, 1984

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

Re: New London Convalescent Home
Case No. 39-CA-2080

Nancy A. Donahue, Esq.
Creane & Donahue
92 Cherry Street
P.O. Box 170
Milford, Connecticut 06460

Dear Ms. Donahue:

Your appeal from the Officer-in-Charge's refusal to issue complaint has been duly considered.

The appeal is denied for the reasons set forth in the Officer-in-Charge's letter dated May 30, 1984. While the appeal contends that the Employer never asked, or ordered, the 17 employees to leave, four of the employees stated that the administrator immediately asked the group to leave and the Union representative, corroborrated by several employees, stated that a few minutes later the administrator repeated his request to each of the 17 individually. None of the 17 employees left until later requested to do so by the police. Accordingly, the Acting General Counsel could not sustain his burden of establishing that the 17 employees were engaged in concerted activities protected by Section 7 of the Act and were discharged for such activities.

Very truly yours,

Wilford W. Johansen
Acting General Counsel

By- Mary M. Shanklin
Mary M. Shanklin, Director
Office of Appeals

cc: Director, Region 1
Officer-in-Charge, Subregion 39
New England Health Care Employees Union, Local 1199, 158 Temple Street, New Haven, Connecticut 06510, Attn: Ms. Ruth Tencsa, Union Representative
New London Convalescent Home, 88 Clark Lane, Waterford, Connecticut 06385, Attn: Mr. Henry Lemoni
Michael R. Miller, Esq., Kunkel & Miller, 259 Fourth Avenue North, St. Petersburg, Florida 33701

No. 87-12

AUG 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

EASTERN CONNECTICUT HEALTH SERVICES, INC.
D/B/A NEW LONDON CONVALESCENT HOME, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
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LINDA SHER
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CARMEL P. EBB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board erred in finding that the lack of participation on the part of petitioner's employees in a change of affiliation decision by the national union with which their collective bargaining agent was affiliated did not relieve petitioner of its duty to bargain.

2. Whether the NLRB erred in finding that the instances of union misconduct alleged by petitioner were not a sufficient basis for revoking the union's certification.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-12

EASTERN CONNECTICUT HEALTH SERVICES, INC.
D/B/A NEW LONDON CONVALESCENT HOME, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A26-A31) is reported at 815 F.2d 517. The decision and order of the National Labor Relations Board (Pet. App. A10-A13), and the decision of the administrative law judge (Pet. App. A14-A25), are reported at 281 N.L.R.B. No. 120. A prior decision of the National Labor Relations Board (Pet. App. A4-A9) is reported at 274 N.L.R.B. 1442.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1987. A timely petition for rehearing was denied on May 15, 1987 (Pet. App. A32). The petition for a writ of certiorari was filed on June 30, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. In August 1983, the employees in a stipulated unit of service and maintenance workers at the New London Convalescent Home (New London) elected, by a vote of 66 to 42, the New England Health Care Employees Union, District 1199 (New England District 1199), as their exclusive bargaining representative (Pet. App. A5). New London, however, filed objections with the National Labor Relations Board, alleging that the New England District 1199 had engaged in unlawful pre-election conduct (*id.* at A1-A2). While New London's objections were pending, petitioner Eastern Connecticut Health Services, Inc., purchased New London's assets, property, and business and assumed complete responsibility for providing health care services at that location (*id.* at A6).[1] Approximately three months later, on June 14, 1984, the Board determined that New London's objections were meritless and certified New England District 1199 as the exclusive bargaining representative of the service and maintenance workers at the New London facility (*id.* at A1-A2). But petitioner refused to bargain with New England District 1199 (*id.* at A6).

Accordingly, the General Counsel issued a complaint alleging that petitioner had violated Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(5) and 158(a)(1), by refusing to bargain in good faith with New England District 1199 (Pet. App. A4-A5). On the General Counsel's motion for summary judgment, the Board held that petitioner was a "successor employer" at the New London facility and therefore had a duty to recognize and bargain with New England District

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[1] Petitioner continued conducting business at the same location, provided the same health care services, and employed at least a majority of the persons previously employed by New London (Pet. App. A6-A7).

1199 (*id.* at A6-A7). In addition, it rejected petitioner's contention that New England District 1199 had engaged in egregious misconduct sufficient to require revocation of its certification or, when combined with alleged employee turnover and the change in ownership, sufficient to rebut the presumption of continued majority support (*id.* at A7). But, citing *Amoco Production Co.*, 262 N.L.R.B. 1240 (1982), aff'd, 721 F.2d 150 (5th Cir. 1983) *(Amoco IV)* (employer not required to bargain with a newly affiliated union that has not permitted non-union members of unit to participate in a change of affiliation decision), the Board agreed with petitioner that material issues of fact existed concerning whether bargaining unit members had been improperly denied participation in New England District 1199's post-certification selection of a new national union affiliate (Pet. App. A7-A8). It therefore ordered that an evidentiary hearing be conducted with respect to this issue (*id.* at A8).

2. The following facts were then adduced: When the representation election was conducted in August 1983, New England District 1199 was one of eleven unions affiliated with the National Union of Hospital and Health Care Employees (the National Union), which in turn was affiliated with the Retail, Wholesale and Department Store Union, AFL-CIO (RWDSU) (Pet. App. A16). On June 6, 1984, prior to New England District 1199's certification at the New London facility, the executive board of the National Union, which included representatives of New England District 1199, voted to disaffiliate from RWDSU, effective October 1, 1984, and to accept an independent charter from the AFL-CIO, effective the same date (*id.* at A17, A20).[2] Neither members of the National

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[2] The disaffiliation was the culmination of a dispute between the National Union and the RWDSU that began in 1982 when the RWDSU revoked the right of its affiliates to secede without its

Union nor members or non-members represented by its affiliates, including New England District 1199, were allowed to vote on the disaffiliation decision (*id.* at A16). On July 13, 1984, however, the National Union notified its district affiliates that it would conduct a membership referendum with respect to its reaffiliation with the AFL-CIO and, on July 31, 1984, mailed such referendum ballots to the 60,000 members who, as of April 30, 1984, were in good standing with the National Union (*id.* at A17, A19). The maintenance and service workers at the New London facility were not officially represented by New England District 1199 on April 30, 1984 and, although membership had been available to them prior to this time, none were eligible to vote in the July 1984 membership referendum (*ibid.*; JX 21, Art. 6).[3] A majority of the members who were eligible to cast votes approved the National Union's acceptance of an independent AFL-CIO charter (*ibid.*).

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approval (Pet. App. A16). In December 1983, the elected delegates to the National Union's convention voted to authorize the National Union's executive board to disaffiliate from the RWDSU (*ibid.*). Litigation followed, resulting in a May 3, 1984, court-approved settlement that permitted the National Union to disaffiliate and that required the RWDSU to support the National Union's request for an independent charter from the AFL-CIO (*id.* at A17). The AFL-CIO offered the National Union such an independent charter on May 7, 1984 (*ibid.*).

[3] Although the parties stipulated, and the NLRB found, that a "substantial number" of petitioner's employees were not members in good standing on April 30, 1984 (J.A. 21; Pet. App. A17), petitioner correctly notes that none of its employees were members of the union by that date (Pet. 12; J.A. 48, 49). Contrary to petitioner's statement (Pet. 14), however, those employees were free before April 30, 1984 to acquire membership in New England District 1199 and to participate in union affairs (JX 21, Art. 6). A substantial number of employees represented by New England District 1199 in other bargaining units were so eligible and did vote in the July 1984 referendum (J.A. 328).

3. The Board, adopting the findings and conclusions of an administrative law judge (ALJ), then held that the change in affiliation raised no question concerning representation and that, on request, petitioner had to bargain with New England District 1199 (Pet. App. A10-A25). Initially, it noted that this Court, in *NLRB* v. *Financial Institution Employees, Local 1182,* No. 84-1493 (Feb. 26, 1986) (*Sea-First*), rejected the rule established in *Amoco IV, i.e.,* that an employer cannot refuse to bargain with a union that has not allowed nonmember employees to vote on an affiliation decision (Pet. App. A18). The Board therefore rejected petitioner's contention that the refusal to bargain was justified by the simple lack of participation that its employees had had with respect to the union's decision to disaffiliate with RWDSU and to reaffiliate with the AFL-CIO (*ibid.*). And it further determined that, while this Court in *Sea-First* indicated that a new representation election may be conducted wherever a change in affiliation raises a question of representation (*ibid.*), the affiliation decision in this case did not raise a substantial representation question (*id.* at A18-A21); the Board found that "due process was observed" in the disaffiliation/affiliation process (*id.* at A18-A19),[4] that there was "more than 'substantial continuity' between the pre- and post-disaffiliation union" (*id.* at A19), and that the change in the National Union's affiliation had no impact on "the certified representative of * * * [petitioner's]

[4] Adopting the ALJ's findings, the Board noted (Pet. App. A19) that "the disaffiliation of the National from RWDSU was approved by duly elected officers of the National and delegates from the Districts," that the disaffiliation "agreement was approved by the United States District Court, thereby providing judicial guidance for the process," and that "a referendum by mail ballot was conducted in which the members approved the direct affiliation to AFL-CIO."

employees"—*i.e.*, New England District 1199 (*id.* at A21).[5]

4. In a per curiam opinion, the court of appeals upheld the Board's decision and enforced its order (Pet. App. A26-A31). The court noted that, "[u]nder the standards set forth" in *Sea-First*, a new election may be required only if the Board finds "that the union's new affiliation 'substantially change[d] a certified union's relationship with the employees it represents' " and, even then, only if " 'it is unclear whether a majority of employees continue to support the recognized union' " (*id.* at A28 (citation omitted)). It then said that "the Board's detailed findings of fact * * * amply warrant its conclusion that the first part of this test had not been met here" (*ibid.*). And it added that, "[i]n any event, the facts alleged by the employer do not suffice to raise a substantial question as to the second part of the test" (*id.* at A28-A29), noting that "[a] union may properly limit voting on [organizational change] questions to its members," that "the fact that this may disenfranchise some of the employees in the bargaining unit is of no consequence; those employees were free to join the union if they wished to participate in its internal

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[5] Specifically, adopting the ALJ's findings, the Board noted (Pet. App. A19-A20) that, following the change in affiliation, New England District 1199 remained one of several geographic districts of the National Union, that there was no change in its jurisdiction, its procedures for organizing employees, its methods of collective bargaining and contract negotiation, or its method of electing officers, and that the officers and staff of both New England District 1199 and the National Union continued to serve in their pre-affiliation capacities. Indeed, it found that, before the change in affiliation, the RWDSU had served the National Union principally as an indirect connection to the AFL-CIO and that, after the change, the National Union simply had a direct connection to the AFL-CIO by virtue of its independent charter, so that, as far as the certified union was concerned, the change in national union affiliation was only "cosmetic" (*id.* at A20).

affairs" (*id.* at A29), and that "the record supports the finding of the Board that the union affirmatively sought to insure that all eligible workers wishing to vote had the opportunity to do so" (*ibid.*).

The court also rejected petitioner's claim that certain alleged instances of "union misconduct" were sufficient "to rebut the ordinary presumption that a union retains majority support for a year following certification" (Pet. App. A29). It reasoned that "the Board is entitled to view such claims with skepticism when made by employers rather than [by] employees," and that "the instances of misconduct alleged by the employer—the brief occupation of an administrative office, and a single instance of assertedly illegal picketing—do not rise to the level of egregiousness which would warrant us in concluding that the Board abused its discretion in requiring the employer to bargain with union" (*id.* at A29-A30).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. In *Sea-First,* this Court held that "the Board exceeded its authority under the Act in requiring that non-union employees be allowed to vote for affiliation before it would order the employer to bargain with the [newly] affiliated union" (slip op. 16). The Court stated that "[u]nder the Act, the certified union must be recognized as the exclusive bargaining representative of all employees in the bargaining unit, and the Board cannot discontinue that recognition without determining that the affiliation raises a question of representation and if so, conducting an election to decide whether the certified union still is the choice of a majority of the unit" (*id.* at 9). The Court acknowledged that, "as is the case with any organizational

[or] structural change, a new affilation may substantially change a certified union's relationship with the employees it represents" and that "[t]hese changed circumstances may in turn raise a 'question of representation' " (*ibid.*). But it also said that, "[i]n many cases, a majority of employees will continue to support the union despite any change precipitated by affiliation" (*id.* at 10 (footnote omitted)), that, "[i]n such situations, affiliation does not necessarily implicate the 'selection' of a new bargaining representative," and that, in these cases, the union "retains a legitimate interest in continuing to bargain collectively with the employer" (*id.* at 10). The Court concluded that "[t]he Act balances these competing concerns by authorizing the Board to conduct a representation election *only* where affiliation raises a question of representation" (*ibid.* (emphasis in original))[6] and that otherwise "the Act gives the Board no authority to require unions to follow [any specific] procedures in adopting organizational changes" (*id.* at 11 (footnote omitted)).[7]

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[6] The Court in *Sea-First* noted with apparent approval (slip. op. 6-7, 9-10, 13-14, 16 n.13) that the Board has held that organizational changes which are substantial enough to create an entirely different entity may raise a question of representation. In such situations, the Board determines whether a question of representation exists by examining such factors as whether the union continues to administer the contracts to which it is a party, whether it has retained its old officers, and whether it has maintained its autonomy with respect to contract negotiations, strikes, and grievances. See *NLRB* v. *Insulfab Plastics, Inc.*, 789 F.2d 961, 966 (1st Cir. 1986).

[7] The NLRB has traditionally required affiliation decisions to be conducted with adequate "due process" safeguards, including notice of the election to all members, an adequate opportunity for members to discuss the election, and reasonable precautions to maintain ballot secrecy. See, *e.g.*, *Newspapers, Inc.*, 210 N.L.R.B. 8, 9 (1974), enforced, 515 F.2d 334 (5th Cir. 1975). The Court in *Sea-First* said that it "need not assess" the Board's statutory authority to impose these requirements. See slip op. 6 n.6.

The decision below follows straightforwardly from the decision in *Sea-First*. The court found substantial evidence to support the Board's finding that the national union's new affiliation did not substantially change New England District 1199's relationship with the service and maintenance workers at the New London facility (Pet. App. A28). The court also found substantial evidence to support the Board's finding that no question of representation—*i.e.*, a question whether the majority of the employees in the unit continued to support the union—was raised by the facts presented in this case (*id.* at A28-A29). And, finally, the court found that "the record supports the finding of the Board that the union affirmatively sought to insure that all eligible workers wishing to vote had the opportunity to do so" (*id.* at A29). In these circumstances, the decision in *Sea-First* required the court below (and the Board) to reject petitioner's claim that the lack of participation by the service and maintenance workers at the New London facility in the national union affiliation decision justified its refusal to bargain.

2. Petitioner simply errs in suggesting (Pet. 12-18) that the decision below conflicts with decisions holding that all employees in the bargaining unit must approve or disapprove any organizational change. First of all, as petitioner apparently concedes (Pet. 13), *Sea-First* explicitly holds that, absent a question of representation, a union may properly limit voting on organizational changes to its members. Second, contrary to petitioner's representation (Pet. 12, 13), the retroactive eligibility date in this case did not preclude any employee in the bargaining unit from participating in the July 1984 referendum election; the Board conducted the representation election at the New London facility approximately eight months before the April 30, 1984 eligibility cut-off date, and employees in the bargaining unit were free throughout that eight-month period to join the Union and to participate in internal

union affairs (Pet. App. A29; JX 21, Art. 6).[8] Finally, no decision of any court or of the Board holds, as petitioner asserts (Pet. 15-17), that at least some union members in a bargaining unit represented by a union (such as New England District 1199) that represents a number of separate bargaining units must participate in an election concerning a proposed organizational change; in fact, the case law is to the contrary. See *Providence Medical Center*, 243 N.L.R.B. 714, 723 (1979); *Montgomery Ward & Co.*, 188 N.L.R.B. 551 (1971). The cases cited in the petition simply do not support the proposition for which they are advanced.[9]

3. Petitioner further errs in suggesting (Pet. 18-19) that "changed circumstances" required the Board to conduct an election to determine whether New England

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[8] There is no foundation for petitioner's suggestion (Pet. 14-15) that the April 30, 1984 eligibility date was manipulated to foreclose participation either by petitioner's employees or by nonmembers in other bargaining units represented by the consolidated local.

[9] In *NLRB* v. *Insulfab Plastics, Inc.*, 789 F.2d 961 (1st Cir. 1986), the issue was whether the informal voting procedures used in the particular circumstances at issue there satisfied the NLRB's "due process" requirements; all of the unit employees belonged to the union and there was no issue raised concerning whether any bargaining unit employee had been denied the right to vote. In *Rinker Materials Corp.*, 162 N.L.R.B. 1688, 1689 (1967), *Carriage Oldsmobile Cadillac, Inc.*, 210 N.L.R.B. 620, 621 (1974), and *1820 Central Park Ave. Restaurant Corp.*, 271 N.L.R.B. 378 (1984), all of which were decided prior to this Court's decision in *Sea-First*, none of the unit employees—union member or nonmember—were allowed to participate in the organizational change procedure. And in *Yale Manufacturing Co.*, 157 N.L.R.B. 597, 598 (1966), which was also decided prior to the decision in *Sea-First*, none of the disenfranchised employees had been permitted to join the union prior to the election. Of course, to the extent *Yale Manufacturing Co.* proscribed a procedure that barred only nonmembers from voting on an organizational change issue, it has been superseded by the decision in *Sea-First*.

District 1199 continued to enjoy majority support of the service and maintenance employees at the New London facility. To be sure, the Court in *Sea-First* stated that, where a new affiliation changes the union's relationship with unit employees, a representation election is appropriate if it is unclear whether a majority of the employees in the unit continue to support the union (slip op. 9-10). Here, however, the Board found that the affiliation decision did not change New England District 1199's relationship with the unit employees or create a question whether the union continued to enjoy majority support of the unit employees. These findings, which the court below upheld, are supported by substantial evidence and do not merit this Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[10]

4. Finally, petitioner errs in contending (Pet. 19-22) that certiorari is required to make clear that the Board may question the representation status of a union where that union engages in "egregious misconduct" during a post-certification year. The Board did not suggest that it is without authority to question the representation status of a union engaging in "egregious misconduct." It merely

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[10] There is no merit to petitioner's assertions (Pet. 19) that its refusal to bargain was justified by "a petition from a vast majority of its unit employees disavowing representation" and the fact that this is a "successorship situation." To begin with, the petition to which petitioner refers was not admitted into evidence at the hearing conducted by the administrative law judge (see J.A. iv); thus, there is no assurance that the signatures on the petition are authentic. Moreover, the signatures on the petition are dated June 26-June 30, 1984 (J.A. 270-271); thus, even if bona fide, the document cannot justify petitioner's earlier refusal, on June 22, 1984, to bargain with the union. Finally, this Court has recently confirmed that the presumption of continuing majority status has particular justification in a successorship situation, because of the "unsettling transition period" following a change in ownership. *Fall River Dyeing & Finishing Corp.* v. *NLRB*, No. 85-1208 (June 1, 1987), slip op. 11.

held that New England District 1199 had not engaged in any such "egregious misconduct." This fact-based determination, upheld by the court below, does not merit review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. at 490-491.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] In *NLRB* v. *Union Nacional de Trabajadores*, 540 F.2d 1 (1st Cir. 1976), cert. denied, 429 U.S. 1039 (1977), the NLRB refused to issue a bargaining order and revoked the certification of newly certified union that had engaged in threatening and violent behavior toward management and represented employees. Here, the allegation was only that an administrative office had been briefly occupied and that arguably illegal picketing had occurred. There was no evidence of violence, physical harm or threats thereof, or the filing by petitioner of any unfair labor practice or criminal charges.

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